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No. 83-555

In the Supreme Court

of the United States

OCTOBER TERM, 1983

RUSSELL STOVER CANDIES, INC., a Missouri corporation, *Appellant*,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, *Appellee*.

Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

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INDEX

Page

APPELLANT HAS NOT PRESENTED ANY SUBSTANTIAL FEDERAL QUESTIONS WORTHY OF REVIEW BY THIS COURT 1

A. THE OPERATIONS OF THE APPELLANT CONSTITUTE A UNITARY BUSINESS OPERATION WITHIN CONSTITUTIONAL GUIDELINES 2

B. HAS THE USE OF THE THREE FACTOR FORMULA VIOLATED CONSTITUTIONAL GUIDELINES FOR APPORTIONMENT OF INCOME .. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases *Page*

ASARCO, Incorporated v. Idaho State Tax Commission, 458 U.S. 307, 73 L. Ed. 2d 787 (1982) . . . 9, 10, 11

Bass, Ratcliff and Gretton v. State Tax Commission, 266 U.S. 271 (1924) 5

Butler Brothers v. McColgan, 315 U.S. 501 (1942) 4, 12, 14

Chase Brass and Copper Co., Inc. v. Franchise Tax Board, 10 Cal. App. 3d 496, 86 Cal. Rptr. 350 (1970), *appeal dismissed*, 400 U.S. 961 (1970) 6

Container Corporation of America v. Franchise Tax Board, 51 U.S.L.W. 4987 (1983) 2, 3, 5, 8, 10, 11, 12, 13, 15

Department of Taxation v. Lucky Stores, Inc., 217 Va. 121, 225 S.E.2d 870 (1976) 6

Exxon Corporation v. Wisconsin Department of Revenue, 447 U.S. 207 (1980) 2, 5

F.W. Woolworth Company v. Taxation and Revenue Department of New Mexico, 458 U.S. 354, 73 L. Ed. 2d 819 (1982) 9, 10, 11

General Motors Corp. v. District of Columbia, 380 U.S. 553 (1965) 13

Hans Reese Sons v. North Carolina ex. rel. Maxwell, 283 U.S. 123 (1931) 14

Honolulu Oil Company v. Franchise Tax Board, 60 Cal. 2d 417, 386 P.2d 40, 34 Cal. Rptr. 552 (1963) . 6

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) 3, 5

Montana Department of Revenue v. American Smelting and Refining Company, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed*, 434 U.S. 1042 (1978) 4, 6

Superior Oil Company v. Franchise Tax Board, 60 Cal. 2d 406, 386 P.2d 33, 34 Cal. Rptr. 545 (1963) . 6

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 4
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) ... 3
Wisconsin Department of Revenue v. Exxon Corporation, 90 Wis. 2nd 700, 281 N.W.2d 9 (1979) 4
W.R. Grace & Company v. Commissioner of Revenue, 378 Mass. 577, 393 N.E.2d 330 (1979) 6

CONSTITUTIONAL PROVISIONS:

United States Constitution, fourteenth amendment 15

U.S. SUPREME COURT RULES:

Rule 16(1)(b) 1

STATUTES:

Section 15-31-301(2) Montana Code Annotated (M.C.A.) 4
Section 15-31-304 Montana Code Annotated (M.C.A.) 8

MISCELLANEOUS:

Uniform Division of Income for Tax Purposes Act (UDITPA) 8

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Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following grounds.

APPELLANT HAS NOT PRESENTED ANY SUBSTANTIAL FEDERAL QUESTIONS WORTHY OF REVIEW BY THIS COURT.

Two questions relating to the proper function of state income tax laws are raised in Appellant's Jurisdictional Statement under the heading "Reasons for Noting Jurisdiction" at page 8. Appellee will demonstrate through its review of these questions that this Court should dismiss this appeal as raising no substantial federal question worthy of review. U.S. Supreme Court Rule 16(1)(b).

A. THE OPERATIONS OF THE APPELLANT CONSTITUTE A UNITARY BUSINESS OPERATION WITHIN CONSTITUTIONAL GUIDELINES.

Appellant's first argument beginning on page 10 of the Jurisdictional Statement in essence is that its corporate operations do not constitute a unitary business. Prior to reviewing the facts as developed in the record of this case, it is important to discuss this Court's most recent pronouncement in the field of state taxation of multistate businesses.

On June 27, 1983, this Court handed down its decision in *Container Corporation of America v. Franchise Tax Board*, 51 U.S.L.W. 4987 (1983). In that case, this Court again discussed the principles of formularly apportionment of income for state taxation of a unitary business. This Court indicated that in reviewing these cases, it will not provide a de novo review on the question of the activities of the taxpayer, but instead will look to see if the state court has applied the appropriate standard. "Rather, our task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment 'was within the realm of permissible judgment' ". 51 U.S.L.W. at 4992.

Standards consistently utilized by this Court in determining the existence of a unitary business arise from the due process and commerce clauses of the constitution. Two requirements are consistently interposed: a minimal connection or nexus between the interstate activities and the taxing state, and a rational relationship between the income attributed to the state and the interstate values of the enterprise. *Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980). A state must demonstrate that in order to tax an entity as a unitary business, some part of the business activity must take part

in the state, and also that there be some ownership or control uniting the unitary business. *Container Corporation v. Franchise Tax Board*, 51 U.S.L.W. at 4989.

Additionally, having once found a business to be unitary, a state in applying an apportionment formula must satisfy the due process and commerce clause requirement that the formula is fair and reflects a reasonable sense of how the income is generated.

The scope of review for this case as announced by this Court in *Container* is whether or not the Montana Supreme Court identified the appropriate principles or standards for determining that the Appellant is in fact a unitary business, and if so, whether the apportionment formula is basically fair.

The Supreme Court of the State of Montana has consistently applied the standards set by this Court in determining the existence of a unitary business. Citing from both *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980) and *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1940), the Montana Supreme Court in its original decision in the present matter, made specific reference to the requirements set forth by the Constitution. See appendix to Jurisdictional Statement p. 19. Assuming the Montana court has applied the appropriate standard, the question becomes whether the decision of the Montana Supreme Court is within the realm of permissible judgment. *Container Corporation v. Franchise Tax Board*, 51 U.S.L.W. at 4992.

In reviewing the facts, it becomes manifestly clear that this corporation operated as a unitary business. Appellant's argument that the box divisions and the ranch divisions are functionally distinct and separate in both a business and economic sense simply is not based on fact. Appellant argues that this Court will not allow the finding

of a unitary business unless vertical integration exists in a taxpayer's activities. This has been specifically refuted by this Court in *Container*. Appellant in its jurisdictional statement has very carefully failed to mention the statutory or standard applied in Montana for the determination of a unitary business. The Montana statutory definition of a unitary business is contained in Section 15-31-301(2), MCA, and provides as follows:

> (2) A corporation engaged in a unitary business within and without Montana must apportion its income as provided for under 15-31-305. A business is unitary when the operation of the business within the state is dependent upon or contributory to the operation of the business outside the state or if the units of the business within and without the state are closely allied and not capable of separate maintenance as independent businesses.

This definition is applicable throughout the entire period of the audit. *Montana Department of Revenue v. American Smelting & Refining Company*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed* 434 U.S. 1042 (1978).

The Wisconsin Supreme Court, in the *Exxon* case, utilized this same test: "The essential test is whether or not the operation of the portion of the business within the state is dependent upon or contributory to the operation of the business outside the state. If there is such a relationship the business is unitary." *Wisconsin Department of Revenue v. Exxon Corporation*, 90 Wis. 2nd 700, 281 N.W.2d 94, 100 (1979). A test which this Court has approved.

It is true that the previous cases before this Court regarding the question of the existance of a unitary business, have been factual situations involving either manufacturing corporations, *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920); general merchandising businesses, *Butler Brothers v. McColgan*, 315 U.S. 501

(1942); multistate distributors, *Bass, Ratcliff and Gretton v. State Tax Commission*, 266 U.S. 271 (1924); or integrated oil companies, *Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980). This factual situation in the present case is therefore somewhat unique in that it involves the activities of a company operating in more than one type of business. However, this Court has never held that vertical integration is a prerequisite for a finding of a unitary business. In fact, this exact argument was presented to the Court in the *Container* case, i.e. that a flow of goods was a prerequisite to a unitary business. Hopefully for the last time this Court made it quite clear that such a requirement is not necessary.

> The prerequisite to a constitutionally acceptable finding of unitary business is a flow of value, not a flow of goods . . . . "[S]ubstantial mutual interdependence," (citation omitted) can arise in any number of ways; a substantial flow of goods is clearly one but just as clearly not the only one.

Container Corporation v. Franchise Tax Board, 51 U.S.L.W. at 4992.

The facts of the instant case demonstrate substantial mutual interdependence arising from the activities of the taxpayer. General management decisions for all divisions were made at the home office. All funds generated by any division were co-mingled and utilized for any needs of the corporation. The ranch divisions were staffed so that they simply could not operate without the services provided by the home office. Appendix to Jurisdictional Statement, pp. 4 and 5. Clearly, these operations cannot be considered "discreet business enterprises", as Appellant suggests, since they are managed, controlled, and funded in the identical manner as all other divisions of the corporation. Contribution or interdependence is ascertained and established from determining such factors as the level

at which major policy matters are established, or the types of services, including financing, accounting, legal, insurance, purchasing, or other services which are provided to the local operations by the home office. *W.R. Grace & Company v. Commissioner of Revenue*, 378 Mass. 577, 393 N.E.2d 330 (1979); *Superior Oil Company v. Franchise Tax Board*, 60 Cal. 2d 406, 386 P.2d 33, 34 Cal. Rptr. 545 (1963); *Honolulu Oil Company v. Franchise Tax Board*, 60 Cal. 2d 417, 386 P.2d 40, 34 Cal. Rptr. 552 (1963); *Department of Taxation v. Lucky Stores, Inc.*, 217 Va. 121, 225 S.E.2d 870 (1976); *Montana Department of Revenue v. American Smelting and Refining Company*, 173 Mont. 316, 567 P.2d 901, *appeal dismissed*, 434 US.. 1042; and *Chase Brass and Copper Co., Inc. v. Franchise Tax Board*, 10 Cal. App. 3d 496, 86 Cal. Rptr. 350 (1970), *appeal dismissed*, 400 U.S. 961 (1970).

When a local in-state division cannot operate without relying on the out-of-state home office for anything other than the most routine day-to-day decisions; centralized services, including such simple things as balancing of checkbooks, making bank deposits, paying bills; or the influx of capital generated by other divisions of the corporation to meet its basic needs, it is inconceivable to assert that the local operation is not dependent upon the operations of the business conducted in other states. When a division is so intertwined with the general overall operations of the company, as in the situation now before this Court, notwithstanding that it produces a different product, it cannot be said that it constitutes an unrelated business activity.

In addition, the ranch divisions operated in the same basic fashion as the box divisions whether it be from cash needs, the handling of funds, or the general management of either the box or cattle divisions. (Transcript, volume 1, p. 163, 165, 166). Other than the fact that the divisions

produced different products, the box divisions were as autonomous from each other as they were from the ranch divisions.

It was noted at the trial of this matter that the box divisions had the same operational supervision as the ranches. There was no joint advertising program, no common salesman, no common guarantees among themselves, the box divisions did not purchase materials jointly, did not purchase expendables commonly for the divisions. (Transcript, volume 1, p. 171, 173, 174). Yet the Appellant has always maintained that the box divisions themselves were unitary. Because of the diversity of the products, this company is not highly integrated. However, it also is not a corporation simply making a totally unrelated business investment in Montana. It is not the situation of a manufacturing concern which would have a separate division purchasing all materials, a separate division handling production, a separate division handling sales. There isn't the instance of the purchasing of materials on a volume basis for all the box divisions but not the ranches. There isn't the transferring of employees throughout the box divisions but not the ranches. What is present is a chairman of the board who runs the total company as he sees fit, whether it be in the box or cattle business. The factors which establish that the box divisions are a unitary business are the same factors as for the ranches. Other than the fact that the cattle divisions produce a different type of product, the operation between the various divisions and the home office is basically the same.

All finances whether for a box or ranch division were handled identically. The theme running throughout the handling of the funds by the corporation was to treat all the divisions as one economic unit, all generating income for all company needs, and the president of the company

making determinations on disbursements of funds for the general economic benefit of the company as a whole. It is not as the Appellant would argue, a situation where the ranches wre completely autonomous. A situation where they would buy and sell cattle and then directly account for any and all funds they have expended or generated. Funds these divisions generated were utilized in the overall company operation, and funds they needed for expenses came from the overall company operations.

Such can also be seen from the treatment afforded by Appellant of the Montana operations in the other states in which it was required to file state income tax returns. As the Court is aware under the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) a corporation is only required to apportion its "business income" to the various states in which it conducts a unitary business. Income arising from activities and transactions occurring outside the business operation of the taxpayer is allocated on the basis of either the taxpayer's commercial domicile in the case of dividends, or to the business situs of the taxpayer in the case of capital gains and sales of real property. Section 15-31-304, MCA, contains the same language as the California statute in *Container Corporation of America v. Franchise Tax Board*, 51 U.S.L.W. at 4989, n. 1. Consistent therewith Appellant treated all interest income as "nonbusiness income" because in the opinion of the accountant for the Appellant, the corporation was not in the business of earning interest income but was in the paper box business. Therefore his opinion was that such income was not generated from transactions or activities in the regular course of the taxpayer's trade or business and should be allocated solely to its state of commercial domicile.

However, such treatment was not afforded to the Montana divisions as noted in the Montana Supreme Court Opinion appendix to Jurisdictional Statement p. 3. The

Appellant filed its tax returns in every other state in which it was operating under the unitary apportionment method including therein the operations of the ranch divisions. In one instance the Appellant indicated the investment income was not apportionable because it was not part of the taxpayer's trade or business. If, as Appellant argues, the Montana divisions constituted an "unrelated business investment" and were not part of its regular trade or business, then income arising from the Montana operations should have been treated as "nonbusiness income". However, Appellant's tax treatment of the ranch divisions is not consistent with that position. In fact, Appellant included the ranch divisions as part of its regular trade or business in every state in which it operated except Montana. The auditor for Appellant upon questioning, admitted that the reason for such treatment of the ranch operations was because they in fact constituted a portion of Appellant's trade or business operation. Transcript, volume 2, p. 48, line 2 to p. 49, line 21.

Nothing in the decisions of this Court in *ASARCO, Incorporated v. Idaho State Tax Commission*, 458 U.S. 307, 73 L. Ed. 2d 787 (1982) or *F.W. Woolworth Company v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 73 L. Ed. 2d 819 (1982) contradict in any way the determination of the Montana Supreme Court. The facts of those cases clearly are distinguishable from the present case. Beginning with *Woolworth*, this Court found that there was no integration between Woolworth and its subsidiaries since the subsidiaries operated autonomously and independently. The subsidiaries had their own separate and complete accounting department and financial staff; did not engage in centralized purchasing, manufacturing, or warehousing for the subsidiaries; had no centralized personnel training for subsidiary personnel; and each subsidiary was responsible for obtaining its own

financing from sources other than the parent. *F.W. Woolworth Company v. Taxation and Revenue Department of New Mexico*, 73 L. Ed. 2d at 828-29. The subsidiaries developed their own sales programs, managerial staff, and instructed their staff in their own methods of operation. They developed their own policies with regard to retailing, they were responsible for determining the size and location of their stores, market conditions, and items to be sold. The parent did not review the tax returns or consult with them on decisions affecting taxes. Woolworth had no policy requiring that subsidiary managers carry out meetings. The most that could be said was that Woolworth had irregular and infrequent contact and then only for occasional oversight. Likewise in *ASARCO*, this Court found that because the subsidiaries were not realistically subject to even minimal control by the parent, they were passive investments, in the basic sense of that term, and could not be included as a portion of the unitary business.

The facts of *Woolworth* and *ASARCO* are distinguishable from the present case and in no way contravene this Court's opinions in those matters. The facts of the present case are more akin to the recent *Container* decision. In *Container* there was a substantial role played by the parent in loaning funds to the subsidiaries and guaranteeing loans provided by others. There was substantial technical assistance provided and supervisory role played by the officers in general guidenace, *Container Corporation of America v. Franchise Tax Board*, 51 U.S.L.W. at 4991. In addition day-to-day management decisions of the subsidiaries were left in the hands of local executives and decisions regarding capital expenditures were subject to review, the overall management of the company was controlled by the parent. *Container Corporation of America v. Franchise Tax Board*, 51 U.S.L.W. at 4991.

The facts in the present case clearly are distinguishable from the *ASARCO* and *Woolworth* cases, and are consistent with the *Container* decision. The operations of the Appellant within Montana did not constitute an unrelated business investment, but were in fact an expansion of its business. From accounting, managerial, and financial standpoints all divisions, whether box or cattle operated essentially in the same way. The Montana operations were incorporated as a part of the totality of the Appellant's method of operation. This type of assimilation was discussed in *Container*.

> The difference lies in whether the management role that the parent does play is grounded in its own operational expertise and its overall operational strategy. In this case, the business "guidelines" established by appellant for its subsidiaries, the "consensus" process by which appellant's management was involved in the subsidiaries' business decisions, and the sometimes uncompensated technical assistance provided by appellant, all point to precisely the sort of operational role we found lacking in *F.W. Woolworth*.

Container Corporation of America v. Franchise Tax Board, 51 U.S.L.W. at 4993, n. 19.

The Montana Supreme Court in reviewing the facts concerning how Appellant operated, found specifically that it met the approved unitariness definition. A corporation which benefits from an umbrella of centralized management and controlled interaction, constitutes a unitary business.

B. HAS THE USE OF THE THREE FACTOR FORMULA VIOLATED CONSTITUTIONAL GUIDELINES FOR APPORTIONMENT OF INCOME.

Issue B raised by Appellant argues that the use of the three factor formula has produced an apportionment of income which is "out of all appropriate proportion to the

business transacted by Appellant in Montana." Jurisdictional Statement p. 19. This Court in *Container* reiterated that it is constitutionally permissible to require a unitary business, to use formulary apportionment, as long as the formula has both internal and external consistency. In other words, the formula must be such that if applied by every jurisdiction no more than all of the unitary businesses income would be taxed; and must actually reflect a reasonable sense of how income is generated. *Container Corporation of America v. Franchise Tax Board*, 51 U.S.L.W. at 4990. The formula utilized by Montana meets both of those standards.

As has been noted by this court numerous times, an apportionment formula cannot be expected to be exact due to the inherent problems a state has in attempting to place upon a business extending into several states "its fair share of the burden of taxation", especially when faced with the impossibility of allocating specifically profits earned within its borders. *Butler Brothers v. McColgan*, 315 U.S. at 507. Such simply is the inherent problem with a unitary operation.

Montana and the other states that have adopted the uniform act utilize the "three factor formula". The formula attempts to view the overall operations of a corporation by giving weight to the factors of payroll, property, and sales. This formula has been approved specifically by this Court.

> We approved the three-factor formula in *Butler Brothers v. McColgan, supra*. Indeed, not only has the three-factor formula met our approval, but it has become, for reasons we discuss in more detail *infra* at 21-22, something of a benchmark against which other apportionment formulas are judged.

Container Corporation of America v. Franchise Tax Board, 51 U.S.L.W. at 4990.

In *General Motors Corp. v. District of Columbia*, 380 U.S. 553 (1965) although not decided on constitutional grounds, this Court specifically discussed the prevalence of the three factor formula by the majority of states requiring payment of such tax, and concluded that the utilization of such a formula tends to eliminate the possibility of multiple taxation of corporate net income by states using formulas based on one or two factors. "The standard three factor formula can be justified as a rough, practical approximation that the distribution of either a corporation's sources of income or the social cost which it generates." *Id* at 561.

When applying the three factor formula to the internal and external consistency requirements mentioned by this Court in *Container*, it is obvious that it meets both standards. As to internal consistency, nothing could be more fair than to have this formula applied by every jurisdiction in which the taxpayer was operating. Obviously no more than all of the unitary business income would be taxed if this were true. As to the external consistency, the use of the formula does reasonably reflect a sense of how the income was generated. Appellant has argued that because the sales of the Montana divisions constituted between 1% and 7% of the total sales and the payroll was between 3.2% and 15.5% of the total payroll this is a distortion in relation to the overall income. What the Appellant has failed to mention is that property, the third factor of the formula must also be included in the formularly apportionment, and over 60% of the real property owned by the corporation is located within Montana.

Appellant would like to equate solely the value of the Montana divisions in relation to the sales they generate. Appellant is in effect saying that the property of the corporation has no functional value in the overall unitary operation and should be given no weight in the apportion-

ment formula. This is in spite of the fact that in other states the Appellant files its return on the unitary basis and includes therein the Montana operations as part of the apportionment formula. Appellant argues that the tax attributable to Montana is all out of proportion to its activities in Montana, yet Appellant includes in its apportionment factors for every other state all of the payroll, sales and yes, property of the Montana activities.

Appellant has cited extensively from the case *Hans Rees' Sons v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931) wherein this Court struck down a single factor formula on the grounds that the average income having its source within North Carolina was 17%, while under the assessment method was allocated 80% of the income. Based on that record and the fact it was a single factor formula this Court found that the operation of the tax was unreasonable and arbitrary. Clearly the same argument cannot be utilized in the present case. Here, the use of the formula acknowledges that more goes into the generation of income, and the proper apportionment of income then merely looking only at a single factor, i.e., sales. By giving equal weight to all factors, the formula takes into account the overall presence of a corporation within a taxing state. The action of the Montana Supreme Corut is consistent with this Court's previous holding in *Butler Brothers v. McColgan*, 315 U.S. at 509.

> We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that these factors may properly be deemed to reflect "the relative contribution of the activities in the various states to the production of the total unitary income", so as to allocate to California its just proportion of the profits earned by Appellant from this unitary business. And no showing has been made that income unconnected with the unitary business has been used in the formula.

Appellant is a unitary business. The Montana apportionment factors include payroll, property, and sales which are a part of this unitary operation. The taxpayer has "the distinct burden of showing by 'clear and cogent evidence' that [the state tax] results in extraterritorial values being taxed." *Container Corporation of America v. Franchise Tax Board*, 51 U.S.L.W. at 4991. The use of the three factor formula for a unitary business results only in the proper apportionment of income. Appellant has therefore raised no argument which invalidates this tax under the due process clause or commerce clause of the fourteenth amendment of the United States Constitution.

CONCLUSION

Appellant's issues have been dealt with previously by this Court, the action of the Supreme Court of Montana is fully consistent with this Court's decisions, therefore no substantial federal question has been raised and Appellee's Motion to Dismiss should be granted.

Respectfully submitted,

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